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THE QUESTION OF DIVORCE.

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I UNDERTAKE, though not without misgiving, to offer answers to your four questions.* For I incline to think that the future of America is of greater importance to Christendom at large than that of any other country; that that future, in its highest features, vitally depends upon the incidents of marriage; and that no country has ever been so directly challenged as America now is to choose its course definitively with reference to one, if not more than one, of the very greatest of those incidents.

The solidity and health of the social body depend upon the soundness of its unit. That unit is the family; and the hinge of the family is to be found in the great and profound institution of marriage. It might be too much to say that a good system of marriage law, and of the practice appertaining to it, of itself insures the well-being of a community. But I cannot doubt that the converse is true; and that, if the relations of husband and wife are wrongly comprehended in what most belongs to them, either as to law or as to conduct, no nation can rise to the fulfil-

* The questions submitted as a basis for the discussion of the subject of Divorce, begun in the November number of THE REVIEW, are reprinted for the convenience of the reader. They are as follows:

1. Do you believe in the principle of divorce under any circumstances?
2. Ought divorced people to be allowed to marry under any circumstances?
3. What is the effect of divorce on the integrity of the family?
4. Does the absolute prohibition of divorce where it exists contribute to the moral purity of society?

ment of the higher destinies of man. There is a worm in the gourd of the public prosperity; and it must wither away.

I. On the first of the four questions I have to observe that the word divorce appears to be used in three different senses. First, it is popularly applied to cases of nullity, as in the world-famous suit of Henry VIII. This sense has only to be named in order to be set aside, since the finding of nullity simply means that, in the particular case, no contract of marriage has ever been made.

The second sense is that which is legally known, in canonical language, as divorce *a mensâ et toro*—from board and bed; and which is termed in the English statute of 1857 judicial separation. The word is employed apparently in this sense by our Authorized Version of the Bible (Matt. v., 32). The Revised Version substitutes the phrase "put away." The question now before me appears to speak of a severance which does not annul the contract of marriage, nor release the parties from its obligations, but which conditionally, and for certain grave causes, suspends their operation in vital particulars. I am not prepared to question in any manner the concession which the law of the church, apparently with the direct authority of St. Paul (1 Cor. vii., 10), makes in this respect to the necessities and the infirmities of human nature.

II. The second question deals with what may be called divorce proper. It resolves itself into the lawfulness or unlawfulness of remarriage, and the answer appears to me to be that remarriage is not admissible under any circumstances or conditions whatsoever.

Not that the difficulties arising from incongruous marriage are to be either denied or extenuated. They are insoluble. But the remedy is worse than the disease.

These sweeping statements ought, I am aware, to be supported by reasoning in detail; which space does not permit, and which I am not qualified adequately to supply. But it seems to me that such reasoning might fall under the following heads:

That marriage is essentially a contract for life, and only expires when life itself expires.

That Christian marriage involves a vow before God.

That no authority has been given to the Christian Church to cancel such a vow.

That it lies beyond the province of the civil legislature, which, from the necessity of things, has a *veto* within the limits of reason upon the making of it, but has no competency to annul it when once made.

That according to the laws of just interpretation remarriage is forbidden by the text of Holy Scripture.

[I would here observe:

1. That the declarations of the Gospels of St. Mark (x., 4), and St. Luke (xvi., 18), and of St. Paul (1 Cor. vii., 10) make no exception whatever.

That the language of St. Matthew prohibits absolutely the remarriage of a woman divorced or put away (*apolelumenēn*, not *tēn apolelumenēn*).

3. That the reservation found in St. Matthew only is reasonably to be referred to the special law of Moses, or what is here termed *porneia.*]

That, although private opinions have not been uniform even in the West, the law of the Latin Church, and also of the Anglican Church, from time immemorial, allows of no remarriage.

[Divorce with liberty to remarry was included in the *Reformatio Legum Ecclesiasticarum* under Edward VI.; but that code never received sanction. In all likelihood it was disapproved by Queen Elizabeth and her advisers.]

That divorce proper, without limitation, essentially and from the time of contraction onwards, alters the character of marriage, and substitutes a relation different in ground and nature.

That divorce with limitation rests upon no clear ground either of principle or of authority.

[In England it was urged, on behalf of the bill of 1857, that adultery broke the marriage-bond *ipso facto*. Yet when the adultery is of both the parties, divorce cannot be given! Again, it is said that the innocent party may remarry. But (1) this is a distinction unknown to Scripture and to history, and (2) this innocent party, who is commonly the husband, is in many cases the more guilty of the two.]

That divorce does not appear to have accompanied primitive marriage. In Scripture we hear nothing of it before Moses. Among the Homeric Achaians it clearly did not exist. It marks degeneracy and the increasing sway of passion.

III. While divorce of any kind impairs the integrity of the family, divorce with remarriage destroys it root and branch. The parental and the conjugal relations are "joined together" by the hand of the Almighty no less than the persons united by the marriage tie to one another. Marriage contemplates not only an

absolute identity of interests and affections, but also the creation of new, joint, and independent obligations, stretching into the future and limited only by the stroke of death. These obligations where divorce proper is in force lose all community, and the obedience reciprocal to them is dislocated and destroyed.

IV. I do not venture to give an answer to this question except within the sphere of my own observations and experience, and in relation to matters properly so cognizable. I have spent nearly sixty years at the centre of British life. Both before and from the beginning of that period absolute divorces were in England abusively obtainable, at very heavy cost, by private acts of Parliament; but they were so rare (perhaps about two in a year) that they did not affect the public tone, and for the English people marriage was virtually a contract indissoluble by law. In the year 1857 the English Divorce Act was passed, for England only. Unquestionably, since that time, the standard of conjugal morality has perceptibly declined among the higher classes of this country, and scandals in respect to it have become more frequent. The decline, as a fact, I know to be recognized by persons of social experience and insight who in no way share my abstract opinions on divorce. Personally, I believe it to be due in part to this great innovation in our marriage laws; but in part only, for other disintegrating causes have been at work. The mystery of marriage is, I admit, two profound for our comprehension; and it seems now to be too exacting for our faith.

The number of divorces *a vinculo* granted by the civil court is, however, still small in comparison with that presented by the returns from some other countries.

W. E. GLADSTONE.

IN REPLY to the questions submitted by the editor of THE NORTH AMERICAN REVIEW, I would briefly say:

As marriage and the family institution constitute the foundation and chief corner-stone of civil society, it is of the greatest moment that the marriage-tie should never be dissolved save for the most urgent reason. I cannot assent, however, to the doctrine that it should never be dissolved at all. Mere separation, though legalized, would often be an inadequate and unjust remedy to the injured party, who would thus be subjected to an enforced celibacy. This might suit the notions of those who regard celi-

bacy as a virtue, but would fail to approve itself to those who take a wider and more charitable view of human nature.

The divine law which says, "What God hath joined together let not man put asunder," immediately adds an exception, "save for the cause of fornication"; showing—what the law of nature dictates—that the case is not governed by any iron rule of universal application. The law, "Thou shalt not kill," has its necessary exceptions, a disreguard of which would render it mischievous in a high degree. I know no other law on the subject but the moral law, which does not consist in arbitrary enactments and decrees, but is adapted to our condition as human beings. This is so, whether it is conceived of as the will of an All-Wise Creator, or as the voice of Humanity, speaking from its experience, its necessities, and its higher instincts. And that law surely does not demand that the injured party to the marriage-bond should be forever tied to one who disregards and violates every obligation which it imposes; to one with whom it is impossible to cohabit; to one whose touch is contamination. Nor does it demand that such injured party, if legally free, should be forever debarred from forming other ties through which the lost hopes of happiness for life may be restored. It is not reason, and it cannot be law, divine or moral, that unfaithfulness, or wilful and obstinate desertion, or persistent cruelty of the stronger party, should afford no ground for relief. The most rigid creeds to the contrary have found methods of dispensation from the theoretical rule. And if no redress be legalized, the law itself will be set at defiance; and greater injury to soul and body will result from clandestine methods of relief.

Yet so desirable is the indissolubility of marriage as an institution, so necessary is it to the happiness of families and the good of society, so pitiable the consequences that often flow from a dissolution, that every discouragement to such a remedy should be interposed. Not only should the judge take every care to see that just cause exists, but that no other remedy is possible. No jugglery or privacy should be tolerated, however high in station the parties may be. Investigation of the truth should be thorough and open, and should be a matter of public concern, participated in by the public representative of the law. It should be regarded as a *quasi-criminal* process, if not accompanied with criminal sanctions. Only serious and even severe methods of administer-

ing the law will be sufficient to repress the growing tendency of discontented parties to rush into the divorce courts.

I think an answer to all your questions is involved in these brief remarks.

J. P. BRADLEY.

MY OPINION is asked in answer to the following questions:

First—Should divorced people be allowed to remarry under any circumstances?

Considering the interests of the public, which should be paramount in divorce laws, *Yes*, under all circumstances where the parties are neither incompetent to enter into another marriage contract nor incapacitated for performing their marital obligations. As there should be no partial divorce, which leaves the parties in the condition aptly described by an eminent jurist "as a wife without a husband and a husband without a wife," so, as a matter of public expediency and in the interest of public morals, whenever and however the marriage is dissolved, both parties, with the exceptions stated above, should be left free to remarry.

If punishment of the guilty party is necessary, some other method should be adopted. Punishment should be reformatory in its character and consistent with the interests of society. No prohibition and no law can change the instincts or control the passions, and prohibition of remarriage is likely to injure society more than the remarriage of the guilty party would. Such a prohibition is without effect except in the territorial limits of the prohibiting State, and is, therefore, of no practical value.

But considered merely as a punishment, and admitting that, having misbehaved in one matrimonial alliance, the guilty party has no claim to be protected in another, prohibition of remarriage would, in my opinion, be in many instances an unwise punishment. Take the case of a man divorced for habitual drunkenness, who has thoroughly reformed; of one divorced after sentence of imprisonment for life, who is afterward pardoned; of one convicted of felony, who has again won his way to public confidence; and even of a man or woman divorced on account of the most flagrant offence against the marriage relation, who is again treading the paths of virtue;—is not a punishment which dooms such persons to perpetual celibacy greater than it should be?

Second—What is the effect of divorce upon the integrity of the family?

Of course, by integrity as used here "moral soundness" is meant. The question does not appear to refer expressly to collusive divorces and divorces obtained for insufficient causes under loose and liberal legislation or lax administration of the divorce laws in some States, but to divorces in general.

Whether a particular divorce promotes or injures the moral soundness of the family must depend entirely upon the circumstances of the case, the cause for which the divorce is granted, and the condition of the children, if any, before and after the divorce. A divorce may be a great injury to the moral welfare of the children, or it may be the only way to promote that welfare. It is evident, if one or both of the parents are unfit to have the custody of the children, and the influence of home is corrupting, that their moral, as well as their educational and financial, interests can be better cared for by the innocent party, freed from the interference of the guilty one, or by strangers under the direction of a Court of Chancery. Divorce for proper causes, free from fraud and collusion, conserves the moral integrity of the family.

No one can overestimate the importance of the family relation and the influence of home upon the rising generation. The family is the foundation of organized society; the institution upon which more than upon all others the character, prosperity, and stability of a nation depend. Let it be corrupted, and the influence which it exerts upon the young be for evil, and the best system of public instruction and the wisest legislation cannot repair the injury to society caused thereby.

The marital union should continue for life. The parties to it should faithfully perform the duties and scrupulonsly keep the obligations of the contract, that the institution may answer the ends for which it was designed—secure the happiness and promote the welfare of the parties to it, and the proper training of the offspring of the union. But suppose that by the misconduct of one of the parties the legitimate ends of marriage are frustrated, the happiness of the parties wrecked, and the influence of the home upon the children perverted until it is only evil. Which is wiser—to render the contract indissoluble, require the continuance of a legal union, with the misery and evil influences it perpetuates, or to relieve the innocent party of the burden of such a

union, and place the children in the custody and under the care of those who will train them under better influences? Unquestionably the latter. There are many cases in which it is better for all concerned that the marital union should be dissolved, and in which the moral integrity of the family and the well-being of society are better conserved by a divorce than without it.

Prohibition of divorce can neither restore the bonds of affection, compel the actual union of husband and wife, nor restrain from infractions of the moral law. The difficult question is to determine what circumstances render divorce better in the interests of good government than the continuance of the marital relation. This should be the crucial test of all divorce legislation.

Third—Does the absolute prohibition of divorce where it exists contribute to the moral purity of society?

To answer this question as it should be answered would require more research than is possible with the limited time at my disposal. If the question were to be determined by a comparison of the condition of society in countries where divorces are permitted with that in which marriage is or has been held to be indissoluble, the question must be answered in the negative. Family morals in the United States, England, and Germany will certainly compare favorably with those in France, Spain, and Italy.

But a fairer comparison, where the other influences affecting the moral purity of society are more nearly equal, is made by Bishop in his valuable work upon "Marriage and Divorce." It is between South Carolina, where, until after the Rebellion at least, no divorces were allowed for any cause, and the States of the Union where divorces are allowed. The legislation and judicial decisions cited by him show a condition of things which might have been expected where divorce was prohibited. The proportion of his property which a married man might give to his concubine was regulated by law; and from the highest tribunal of the State the following vigorous protest against laws which prohibited divorce and at the same time punished adultery was made. In Cusack *v.* White, 2 Mill, 279, Judge Nott said:

"In this country, where divorces are not allowed for any cause whatever, we sometimes see men of excellent characters unfortunate in their marriages, and virtuous women abandoned or driven away houseless by their husbands, *who would be doomed to celibacy and solitude if they did not form connections which the law does not allow, and who make excellent husbands and virtuous wives still.* Yet they are considered as living in adultery, because a rigorous and unyielding law, from motives of policy alone, has ordained it so."

It does not appear that where divorce is refused it has prevented the wrongs for which divorces are granted in other countries. If parties who cannot or will not live together are not permitted to dissolve in law the bonds already sundered in fact, experience shows that they will form unlawful connections, and that public sentiment will largely justify them. The legislation that does most to discourage such connections, and to substitute for them legalized unions of the sexes, does most to promote moral purity.

There is much truth in the saying of an eminent French statesman in reference to prohibition of divorce, that

"laws to be obeyed must not do too great violence to our nature, which is always able to avenge itself upon the despotism of the law, either by crime, which is a violent reaction, or by corruption, which is a still but continued protest against despotism."

Fourth—What steps are necessary to procure a practical measure of reform.?

This is the important question. Opinions are and will always be divided concerning the matters embraced in the preceding questions. Divorces will continue to be granted and prohibition against the marriage of the guilty party will continue to be, as it now is, exceptional. But a great majority of the thinking people of this country recognize the evils growing out of lax laws concerning divorce and careless administration of them, and the necessity for reform. The evils to be remedied may be stated in a general way as follows:

1. Laws authorizing divorce for insufficient causes, upon insufficient residence of the parties, and insufficient notice to the defendant.

2. Lax administration by the courts of the laws concerning divorce, admitting of collusion and fraudulent divorces.

3. Want of uniformity in the laws of the several States prescribing causes for divorce, concerning the residence of the parties and notice to the defendant, and in judicial decisions as to the force and effect of a decree dissolving the marriage contract.

The result of this lax and diverse legislation and loose administration of the laws is that parties who wish to avoid the more stringent laws of one State migrate to a State where divorce is easy, for the sole purpose of securing a dissolution of the marriage contract for causes, and upon notice and testimony, which would be insufficient in the State of their actual residence. The number of

divorces continues to increase, many of which, held to be valid in the States where obtained, would be declared fraudulent and void in other States, and marriages by the divorced parties held to be legal in the States where the divorce was granted would be held to be bigamous elsewhere. If it is the husband who secures a divorce and remarries, the personal status of two women and the property rights of two families are involved. The first wife is still the lawful wife entitled to dower in the real estate of her husband in the State in which the first marriage was entered into, and probably in every other State except the one in which the fraudulent divorce was obtained. The second wife is entitled to dower under the laws of the State in which her marriage took place, and the children by that marriage are legitimate in that State, but elsewhere they are illegitimate and their mother is not entitled to dower.

What can be done to remedy these evils? The same steps are required that are necessary to secure legislative reform upon any other subject—agitation of the question, education of the people to bring about a healthy public sentiment, and a more careful administration of the existing laws in the several States, to secure legislation by the States limiting and more carefully defining the causes for divorce, providing better safeguards against imposition upon the court, and, as far as possible, uniformity in the laws of the several States, and the enacting by Congress of a stringent and uniform law upon the subject for the District of Columbia and the Territories.

But whatever may be accomplished in this manner, there will exist, as long as each State has the power to legislate for itself upon the subject, a want of uniformity in the laws of the several States, from which great inconvenience and confusion of personal and property rights will arise. We now have forty-two States. The population of all of them is composed of men and women of varying shades of opinion upon social questions; and the sentiment of the people of the different States, in the nature of things, is and will continue to be diverse upon the subject of divorce, making it inevitable that there shall be a corresponding diversity in the laws concerning it.

A most important measure of reform, at least a step greatly simplifying the problem, would be the adoption of an amendment to the Federal Constitution granting to Congress power to legislate upon the subjects of marriage and divorce. It is the right

and duty of the State to prescribe the qualifications of parties to the marriage contract, the manner in which it shall be solemnized and authenticated, the causes for which it may be set aside or annulled, and the effect of the dissolution upon the personal status and property rights of the parties and their children; but there is nothing in the structure of our government to prevent this power being conferred upon the Federal Government.

Which shall legislate upon the subject, the States or the Federal Government, is a mere question of public convenience and welfare. A diversity in the laws on these subjects between independent nations gives rise to comparatively little confusion; but the relations between the States of the Union are entirely different from those between such nations. A citizen of the United States may be a resident to-day of one State and to-morrow of another; but his change of residence should be without change or impairment of his rights of citizenship or of his personal or property rights.

A recent writer upon the subject of divorce considers the securing of an amendment to the Federal Constitution empowering Congress to legislate upon marriage and divorce impracticable; and it may prove to be so. It certainly is encompassed with difficulties. The same writer seems to think that it is practicable to secure uniformity of legislation upon the subject in the several States by agreement. But if the proposed amendment to the Federal Constitution is impracticable, a scheme for securing uniform legislation through the coöperation of the States is visionary. The one plan requires the consent of all the States, and promises no permanency, while the other requires the consent of only three-fourths of the States, and if accomplished would be permanent. Even if concert of action by State legislatures could be secured, the uniformity could not be preserved, as one cannot bind another.

The difficulties of securing such an amendment are not as great as have been imagined. The feeling of antagonism between the Federal and State governments is largely dying out. As a rule, however proud the citizen is of his State, he is quite as proud of being a citizen of the United States. However jealous he is of the rights of his State, he is quite as much so of the rights of his greater country, which embraces all the States and exercises its legitimate powers over every foot of territory and upon every citizen of the Union. Let it be clearly shown that Congress can best legislate in the interests of the whole people

upon the subject, and the people and their representatives, the legislative assemblies, can be trusted to authorize it.

The objections to such an amendment have been magnified. It has been claimed that, if Congress is empowered to legislate upon the subject of marriage and divorce, "it will eventually absorb all the powers incidental to the subject." Congress could exercise only such express powers as were granted by the amendment, and powers necessarily implied in the express grant. It is true that the United States courts would have jurisdiction to enforce the laws which Congress might enact under such an amendment. That jurisdiction, however, would extend only to cases brought under those laws, and to cases in which some question arising under them was involved. Such an amendment would not, as has been supposed, confer upon Congress or the United States courts jurisdiction over the other relations of "husband and wife," over the relations of "parent and child," of "dower and courtesy," of "the law of descent," or of "the law of distribution." Jurisdiction on these subjects would be left where it now is—with the States. Divorces might be left to the State courts, if neither party chose to resort to the Federal tribunals.

But suppose such an amendment would involve the surrender by the States of jurisdiction of all the matters claimed by those who oppose such amendment. That would not necessarily be an argument against its adoption. The real question would still be whether it would be better for the whole people of the United States, in order to secure uniformity in the laws regulating marriage and divorce, and in the status and property rights of divorced parties and their children, that the Federal Government should possess the additional power proposed by the amendment. The Constitution was wisely framed, and was well adapted to the purposes for which it was intended at the time it was adopted; but to contend that it is too sacred to be amended in any particular is absurd. It was the creature of the people; it is subject to change when they will it. Provision was wisely made for its amendment as experience should dictate. Amendments may be proposed by Congress, but their adoption rests alone with the States. An amendment which secures the concurrence of three-fourths of the States must represent the will of the large majority of the people of the Union who are to be governed by it, and has a strong presumption of merit in its favor.

J. N. DOLPH.